with the intent to outrage the modesty of a woman and the appellant is guilty of an offence punishable under section 354 of the Penal Code.

We alter the conviction to one under section 354 of the Penal Code.

*Order accordingly.*

Solicitors: *David Marshall.*

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## RAWTHER v. ABDUL KAREEM

**[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and and Suffian J.) December 1, 1965]**

**[K.L. — Federal Court Civil Appeal No. 26 of 1965]**

*Practice and Procedure — Appeal — Judgment in default of appearance — Application for stay pending application to set aside judgment — R.S.C. 1957, O. 36 rr. 31 and 33.*

In this case an application was made for the stay of an appeal on the ground that the judgment was obtained in default of appearance and the defendant wished to apply to have the judgment set aside.

**Held:** the court had a discretion whether to proceed to hear the case forthwith or to stay it pending an attempt by the appellant to have the judgment set aside and in the circumstances of this case and especially because of the fact that the appellant intended to apply for fresh evidence to be heard, the appeal should be stayed pending application being made to set aside the judgment.

*Cases referred to:—*

(1) *Vint* v. *Hudspith* 29 Ch.D. 322.

(2) *Armour* v. *Bate* [1891] 2 Q.B. 233.

FEDERAL COURT.

*Morris* for the appellant.

*K. A. Menon* for the respondent.

**Thomson L.P.** (delivering oral judgment): A preliminary point has been taken (and here I choose my words with some care) that we should not proceed with the hearing of this appeal by reason of the nature of the trial to which it is the sequel.

Counsel for the respondent used the expression that the appeal was "incompetent". If by that he meant there was no right of appeal in our view he went too far because clearly by section 67 of the Judicature Act there is a right of appeal from every judgment of the High Court.

The point, however, is this that when the matter came on for trial the defendant, the present appellant, was not present either by himself or counsel until the very last day of the trial which was six months after the hearing of evidence had been completed, when the judge was about to deliver and proceeded to deliver judgment against him. On that it was submitted that the case fell within R.S.C. Order 36, rules 31 and 33.

In our view the present case does fall within these rules but we do not agree that the effect of rule 33 is to make compliance with that rule a condition precedent without fulfilment of which an unsuccessful defendant cannot proceed to appeal. In our view, based largely on the cases of *Vint* v. *Hudspith* (1) and *Armour* v. *Bate,* (2) the true position is that this court has a discretion as to whether to proceed to hear the appeal forthwith or to stay it pending an attempt by the appellant to comply with rule 33. That discretion is to be exercised, of course, on the facts of each individual case and applying our minds to the facts of the present case we consider it relevant that the appellant has very candidly stated that he will inevitably be compelled to make an application for the hearing of fresh evidence. We express no views whatsoever as to the prospects of success of such application. But were such an application to be made and were it to be successful we should then be placed in the position, which would certainly not be conducive to the doing of justice and which might be far from conducive to the appellant's own interest, of having to weigh fresh evidence which we ourselves had heard against other evidence which the trial judge alone had heard.

In the circumstances we are of the opinion that the appeal should be stayed pending an application being made to the High Court under Order 36.

As regards costs, obviously whatever happens the question of costs is going to be very complicated and the question should stand over.

**Barakbah C.J. (Malaya)** and **Suffian J.** concurred.

*Order accordingly.*

Solicitors: *Morris Edgar & Co.; Talalla & Menon.*

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## YONG YOKE SUNG & ORS. v. SUNGEI WAY ESTATE

**[F.C. (Thomson L.P., Pike C.J. (Borneo) and Gill J.) December 1, 1965]**

**[K.L. — Federal Court Civil Appeal No. 52 of 1965]**

*Master and Servant — Disobedience — Dismissal of workers for refusal to obey order of transfer and for absenting themselves from work — Breach of contract of service — Reasonableness of order of transfer — Appeal from labour commissioner — Procedure for appeal.*

*Employment — Breach of contract of service — Dismissal — Employment Ordinance, 1955, ss. 16 and 77(2).*

*Practice and Procedure — Appeal from labour commissioner — Employment Ordinance, 1955, s. 77(2) — R.S.C. 1957, O. 59 r. 13.*

The appellants appealed against the decision of the High Court ([1965] 2 M.L.J. 229) which had dismissed their appeal against the decision of the commissioner of labour who had rejected a claim by the appellants to one month's wages in lieu of notice from their employers,